

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANTHONY LOVATO and VELDA
LOVATO, husband and wife,

Plaintiffs,

v.

Civ. No. 04-0018 RLP

ALLSTATE INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on Plaintiffs' Motion for Judgment N.O.V. or a New Trial, filed on August 26, 2005. Having considered the record, arguments of counsel, and being otherwise fully advised, the court finds that the Motion should be **denied**.

On August 8 -10, 2005, this case was heard by a jury which found for Defendant. Plaintiffs ask that the jury verdict be set aside, arguing that the verdict was unreasonable and not consistent with the evidence to such an extent as to indicate a lack of understanding by the jury.

Federal Rule of Civil Procedure 59 governs the granting of a new trial. A new trial may be granted if, *inter alia*, the verdict is against the weight of the evidence. *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1988). The district court's grant or denial of a motion for new trial made on the ground that the verdict is against the weight of the evidence normally involves a review of the facts presented at trial, and thus involves the discretion of the court. *Black v. Heib's Enter., Inc.*, 805 F.2d 360, 363 (10th Cir. 1986).

In this case, Plaintiffs were required to prove by a preponderance of the evidence that it was more likely that the roof damage was caused by a sudden and an accidental occurrence and not by some other cause. Their argument in support of their motion is that their testimony was uncontested. As Defendant points out, Plaintiffs may have not contradicted each other, but the documentary evidence together with witness evidence, called into question several individuals' credibility.

It is the province of the jury to weigh the evidence presented by both parties, as well as the credibility of the witnesses, and ultimately decide whether Plaintiffs met their burden. The jury found in favor of Defendant and against Plaintiffs. The verdict was not "clearly, decidedly or overwhelmingly against the weight of the evidence." *York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 958 (10th Cir. 1996).

IT IS THEREFORE ORDERED that the Plaintiff's Motion for Judgment N.O.V. or a New Trial [Doc. 68] is denied.

IT IS SO ORDERED.



Richard L. Puglisi
United States Magistrate Judge
(sitting by designation)